IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD and J. WESLEY CARLSON, doing business as BONDIFIED SYSTEMS, and EUGENE DERRICK,

Appellees.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

BRIEF FOR APPELLEES.

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Cases Cited.

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OPINION BELOW

The opinion delivered by the United States District Court for the Northern District of Illinois, Eastern Division, from whose decree this appeal has been taken is reported in 136 Federal Supplement 887

QUESTIONS PRESENTED

Appellants' brief, page 4, sets forth the first question presented as follows: "Does the exemption of American Express Company money orders, there being no corresponding exemption for appellees, deny appellees the equal protection of the laws?"

As stated, there is an implication that appellees claim to be entitled to the same special privilege given to sellers of American Express Company money orders. To add Bondfied Systems money order to the list of exempt money orders in the definition would merely take away appellees' standing to challenge the exemption, yet the exemption of money orders of both companies could still be challenged as an arbitrary and unreasonable grant of a special privilege to those companies and persons selling their money orders. Fairly stated the question presented is: "Does the definition of 'community currency exchange' contained in the Illinois Community Currency Exchange Act make a reasonable classification between a person engaged in the business of selling or issuing American Express Company money orders and a person engaged in the business of selling or issuing any other money orders?"

The other questions presented are fairly stated in appellants' brief.

STATEMENT.

The District Court, after a trial, enjoined the appellants from enforcing the provisions of the Illinois Community Currency Exchange Act against appellees so long as they engage only in the business of issuing and selling money orders. (R. 528)[2]

The money orders involved in this case are sold by the American Express Company and appellees through

authorized agents located principally in retail establishments such as drug and grocery stores. (R. 16, 27; Pl. Ex. 5, R. 155; 525) They are purchased by persons without bank accounts who need a convenient way of paying their bills. (R. 348)

The Illinois Community Currency Exchange Act establishes a system of regulation of "community currency exchanges," as defined in the Act, throughout Illinois and requires, among other things, that a person within the definition of "community currency exchange" obtain a license from the state, which is contingent upon the payment of a $250.00 investigation fee, the determination by the Illinois State Auditor that the issuance of the license will promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, the filing of a surety bond in an amount from $2000 to $25,000 and an insurance policy in an amount from $2500 to $35,000, and the maintenance of a minimum sum of $3000 of cash funds available for the uses and purposes of the business, plus an amount of liquid funds sufficient to pay on demand all outstanding money orders issued. Each community currency exchange is required to pay an annual license fee of $500.00 and no community currency exchange may be conducted as a department of another business. Each must be an entity financed and conducted as a separate business unit.

Section 31 of the statute provides "'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this state and national banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks,

drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services."

The appellees, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, are citizens of Illinois, each of whom owns his own home in Wheaton, Illinois. (R. 37, 50, 68, 69) The appellee, Eugene Derrick, is a citizen of Illinois who has been a druggist for 35 years. (R. 88)

Checks, Incorporated, a Minnesota corporation organized in 1940, is engaged in the business of distributing money orders and other forms used in connection with the transmission of credits, (Deft. Ex. 6; R. 96, 277) bearing the name "Bondified", which is a trade name registered in the United States Patent office. (R. 71)

On August 6, 1953 Bondified Systems, Inc., a Minnesota corporation organized by the appellees George W. Doud, Donald Q. McDonald and J. Wesley Carlson, entered into an "operator contract" with Checks, Incorporated whereby the latter agreed to grant to Bondified Systems, Inc. an exclusive license to distribute Bondified money orders to the public directly and through duly licensed morally and financially responsible agencies appointed by Bondified Systems, Inc. in the greater Chicago metropolitan area, including parts of Indiana. (Deft. Ex. 2; R. 96, 259, Pl. Ex. 5; R. 95, 135). The "operator contract" contains numerous controls and standards which Bondi-

fied Systems, Inc. and its agents or assignees must meet and is much more than a naked license agreement. (R. 525)

The operator contract provides, among other things, that Bondified Systems, Inc. shall have the right of distribution of Bondified money orders so long as Bondified Systems, Inc. shall put forth diligent effort to produce and maintain active agents for the sale of such money orders. It provides that Bondified Systems, Inc. is to establish and maintain a separate car-marked bank account in a bank approved by Checks, Incorporated, which bank is insured by the Federal Deposit Insurance Corporation and a member of the Federal Reserve System and upon which separate car marked account money orders issued by each agent of Bondified Systems, Inc. shall be drawn. It provides that Bondified Systems, Inc. shall maintain a free balance of $10,000 in said account. It provides that the face amounts of all money orders issued by Bondified Systems, Inc., or any of its agencies, shall be deposited in said bank account not later than the eighth business day after being issued and shall remain on deposit until all such money orders have been presented for payment or outlawed by the Statute of Limitations of the state in which they are issued. It provides for a percentage division of the fees collected for the sale of money orders between Bondified Systems, Inc. and its agents. It provides that all the records of Bondified Systems, Inc. and its agents shall be available for inspection by Checks, Incorporated at all times and that Bondified Systems, Inc. shall furnish an operating statement and financial statement to Checks, Incorporated at least once a month. It further provides that Bondified Systems, Inc. shall require a surety bond in the sum of $1000 or more of each of its agents. It

provides that Bondified Systems, Inc. shall furnish a $10,000 bond in favor of the bank where the separate ear-marked account is maintained, which bond shall have as a condition that Bondified Systems, Inc. will at all times have on deposit in such bank sufficient funds so that the bank will promptly pay any Bondified money orders in the amount issued by Bondified Systems, Inc. or its agents. It provides that Bondified Systems, Inc. has the right to assign any and all licenses and rights under the operator license contract to a partnership to be organized under the laws of the State of Illinois, of which the partners shall be J. Wesley Carlson, Donald Q. McDonald and George W. Doud, doing business as Bondified Systems.

Bondified Systems, Inc. received a certificate of authority to do business in Illinois on July 30, 1953. It had been unable to obtain such a certificate until it had amended its charter and application to preclude it from engaging in the currency exchange business in Illinois as defined in the Illinois Community Currency Exchange Act by reason of a policy in the office of the Illinois Secretary of State requiring clearance from the State Auditor, then Orville E. Hodge, before such certificate of authority would be issued. No such policy existed with respect to other corporations which in addition to a charter for a domestic corporation or a certificate of authority for a foreign corporation, were required to have a license to operate. (R. 85, 87; Pl. Ex. 1; R. 95, 126; Deft. Ex. 3; R. 96, 269)

On August 15, 1953 Bondified Systems, Inc. executed an assignment of the license from Checks, Incorporated relating to the Illinois territory covered by the license to the appellees Doud, McDonald and Carlson, a partnership doing business as Bondified Systems. (Pl. Ex. 6; R. 95, 143)

On November 14, 1953 Bondified Systems, Inc. entered into an agency agreement with the partnership for the latter to conduct the Indiana operations as agent of the corporation. (Pl. Ex. 10, R. 95, 169)

The Illinois operations which are carried on by the partnership under the assignment of August 15, 1953, and the Indiana operations which are carried on by the partnership under the agency agreement of November 14, 1953, were combined and the special account required to be kept under the operator contract with Checks, Incorporated was maintained by the partnership for both operations with a provision for an accounting at an appropriate accounting date by the duly authorized accountants to be employed by the corporation and partnership (R. 43, Pl. Ex. 10; R. 95, 169)

At the time of the trial the separate earmarked account for the payment of money orders was maintained at the City National Bank and Trust Company of Chicago and had a balance of $22,827.53, representing the $10,000 free balance required to be maintained under the operator contract with Checks, Incorporated as well as the August 15, 1953 assignment of license plus a "float" or amount of money for which money orders had been issued but were still outstanding and had not been paid or redeemed in the amount of $12,827.53. (R. 62, 67; Pl. Ex. 5; R. 95, 135; Pl. Ex. 6; R. 95, 143) From October 6, 1953 through October, 1954 the partnership maintained an average daily balance of more than $16,000 in this account. (R. 67) The partnership also maintained an operating account for both the Illinois and Indiana operations. (R. 45) This account carried a balance of $9,000 on the day suit was filed, $1[illegible],000 the following week, (Pl. Ex. 20; R. 95, 244) and more than $4,000 at the time of the trial, twelve months later. (R. 62) There re-

mained in a corporate account a balance of $38.10, representing interest which had been paid by one of the appellees on money he had borrowed and paid back to the corporation. (R. 47) At the time of the trial the accounting required under the agency agreement of November 14, 1953 had not been completed. (R. 66) In its first year of operation in a few counties in Northern Indiana the partnership sold more than $1,400,000 in money orders. (R. 64) The appellees Doud, McDonald and Carlson maintain offices in Chicago, Illinois. (Pl. Ex. 4; R. 95, 134A) Bondified Systems, Inc. and the partnership carry a primary commercial blanket bond in the amount of $10,000. (Pl. Ex. 7, R. 95, 147) The partnership has a deposit agreement with the City National Bank and Trust Company of Chicago providing, among other things, for the maintenance of a minimum balance of $10,000 in a special earmarked account for the payment of money orders drawn by them or their agents. (Pl. Ex. 8, R. 95, 157) The partnership has an indemnity bond in the amount of $10,000 in favor of the bank conditioned upon performance of the deposit agreement (Pl. Ex. 9, R. 95, 163) and referred to in the operator contract as a performance bond. (Pl. Ex. 5, R. 95, 135) The partners also have a special purchase agreement for the purchase and sale of the partnership and corporate interests by the survivors in the event of the death of either of them. (Pl. Ex. 11, R. 95, 173)

The appellees Doud, McDonald and Carlson, doing business as Bondified Systems, entered into an agency license agreement with the appellee Eugene Derrick, making him their agent for the sale of Bondified money orders at his place of business in Wheaton, Illinois (R. 88, Pl. Ex. 12, R. 95, 182).

Derrick wrote the State Auditor, then Orville E. Hodge, that he had received the agency, that he claimed the

Illinois Community Currency Exchange Act violated his constitutional right to operate a legal business and that he intended to commence the sale of Bondified money orders as soon as he received his supplies. (Pl. Ex. 23; R. 95, 247) The appellants threatened to enforce the Act against appellees if they violated it. (R. 29). In October, 1953 Derrick received his supplies and proceeded to sell Bondified money orders in Illinois, (Deft. Ex. 4; R. 96, 275; Pl. Ex. 16; R. 95, 224, 225) and to make reports and remittances to the appellees, Doud, McDonald and Carlson. (Pl. Ex. 17; R. 95, 226, 227) and the money orders were paid out of the separate earmarked bank account in which the remittances were deposited. (Pl. Ex. 16 through 19, R. 95, 224-243. Appellees then brought this suit seeking to enjoin the appellants from enforcing the Act against them.

On the partnership money order forms, the word "licensed" appears at the bottom of the form in small letters opposite the word "bonded". (Pl. Ex. 16, R. 95, 224) The word "licensed" refers to the license from Checks, Incorporated. (R. 60, 79, 80) The word "licensed" also appears on the forms sold in Michigan, (Pl. Ex. 29, R. 95, 257) but the Bondified operator in Michigan is not required to have a state license to sell money orders. (R. 79) There is no evidence that the word "licensed" is intended to mean that the money order was licensed under the Illinois Community Currency Exchange Act and there is no evidence that any one was ever misled by the use of that word. (R. 525)

The American Express Company is an aggregation of individuals operating as a joint stock company under the laws of New York. It is engaged in the business of selling and issuing money orders in Chicago through retail establishments such as drug and grocery stores. No statutes

provide for any regulation by any board, commission or regulatory body of the operations of the American Express Company in Illinois. The American Express Company does not operate under any franchise granted by the State of Illinois and the American Express Company is not subject to regulation by any regulatory body in Illinois. (R. 16, 17, 27) There is also the American Express Company, Incorporated, a New York corporation, a wholly owned subsidiary of the American Express Company, which is primarily set up to handle the operations of the American Express Company in foreign countries (R. 340) and in connection with its foreign operations this corporation is subject to government surveillance. (R. 321-322) There was an American Express Company, an Illinois corporation, organized under a special act of the Illinois legislature, (R. 86) which company had its charter cancelled on July 1, 1902 for failure to file annual reports. (R. 87)

The American Express Company and the appellees operate their businesses in Illinois in substantially the same manner in that they confine their operations to selling and issuing money orders and this business is conducted through authorized agents located principally in retail establishments such as drug and grocery stores. (R. 525) Both appellees and American Express Company agents issue money orders in any amount up to and including $100 and their schedules of fees are identical. (Pl. Ex. 42; R. 95, 182, 359)

American Express Company does not always bond its agents (R. 345) as appellees do, (R. 526) nor does it pay every money order issued by its agents (R. 361); litigation occasionally ensues (R. 362) and American Express Company may be able successfully to avoid service of process by the courts of Illinois. (R. 526)

The appellee Derrick is prohibited by Section 38 of the statute from selling Bondified money orders in connection with his drug store business, but he was permitted to sell American Express Company money orders at the same store in 1948 and 1949. (R. 526)

The appellants concede that appellees are required to qualify under the statute and that they will enforce it against them when they violate it, which admittedly they are doing. The appellants were not apprised of a violation until shortly before appellees filed their complaint. To operate as a currency exchange without first securing a license subjects the appellees to a criminal prosecution and the penalty of a heavy fine or imprisonment or both. In the meantime the appellees, to avoid further possible penalties are withholding establishment of additional agencies in Illinois and losing the opportunity to conduct and expand their business. Appellees have demonstrated the imminence of irreparable injury. (R. 526)

SUMMARY OF THE ARGUMENT.

The statute exempts those engaged in the business of selling American Express Company money orders by an arbitrary selection without disclosing some difference, having a reasonable and substantial relation to the purposes of the legislation, between those exempted and all others, including appellees, engaged in the same business. In view of the findings of the District Court fully supported by the record there is no reasonable basis for the exemption.

There was no need to remit the parties to the state courts as the meaning of the statute is clear and its application to the appellees is unquestioned. This Court will decide for itself whether the exemption is severable in a case coming from a lower federal court in the absence of

a controlling state decision, and especially so where the nonseverability of the challenged part is clear from its relationship to the whole statute and the state court has said the statute would not have been passed without the exemption.

The conduct of the appellees had no relationship to the constitutionality of the challenged statute and did not call for the application of the clean hands maxim. In fact, the conduct was not such as to bar them from equitable relief in any case since the use of the words "licensed" and "bonded" was neither intended to mislead, nor did mislead, and had a valid meaning on their money orders. The trademark license under which the appellees operate provides for supervisory control of the product or services and is valid and in nowise a continuing misrepresentation of the ownership of the business and financial responsibility thereof.

The finding that appellees have demonstrated the imminence of irreparable injury is amply supported by the evidence.

ARGUMENT

I.

THE ILLINOIS COMMUNITY CURRENCY EXCHANGE ACT AS AMENDED DENIES APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The distinction that the challenged statute makes is between persons engaged in the business of selling or issuing American Express Company money orders and persons engaged in the business of selling or issuing any other money orders. It is this distinction that operates to deprive appellees of the equal protection of the laws and not a distinction between American Express Company and appellees. As appellees sell or issue their money orders through agencies located in retail establishments their concern is whether their agent, the appellee Derrick, and other persons in Illinois similarly situated are to be barred from selling their money orders but not from selling the money orders of their competitor, American Express Company.

That there are differences between the American Express Company and appellees is not disputed, but it is disputed that any differences justify the distinction made by the Statute.

The exemption declared invalid in *Wedesweiler v. Braudage*, 297 Ill. 228, was a proviso in the Illinois banking law exempting express, steamship and telegraph companies from the prohibition against natural persons, firms or partnerships transmitting money to foreign countries. The Illinois court said:

> "So far as incorporated banks are concerned the reason for the distinction is apparent. As between

natural persons and partnerships on the one hand, and express, steamship and telegraph companies on the other, the distinction is not based upon any just reason. It has no reference to character, solvency, financial responsibility, security, business or monetary facilities, incorporation, method of doing business, public inspection, supervision or report or any other thing having any relation to the protection of the public from loss by reason of the dishonesty, incompetence, ignorance or irresponsibility of persons engaging in that business."

Appellants suggest age, experience, history and governmental surveillance as other things having a relation to the protection of the public from loss. But the bald exemption of American Express Company money orders has no reference to anything except a name on a money order and examining the exemption in light of the findings of the District Court it is apparent that a druggist selling American Express Company money orders in Illinois as opposed to appellee Derrick is not distinguishable in any of the criteria except that he does not always have the security required of Derrick and his business or monetary facility is an unincorporated joint stock company not licensed in Illinois rather than a national bank in Illinois.

Neither a District Court sitting in the Western District of Wisconsin, *Currency Services, Inc., et al., v. Matthews et al.*, 90 Fed. Supp. 40, nor the court below has been able to find a reasonable basis upon which to sustain the distinction.

Appellants suggest that there is a reasonable basis for the distinction if the Illinois legislature could have reasonably believed that American Express Company money orders were much safer than any others, but their suggestion is not supported by the record. The District Court recognized that the American Express Company is of

of high integrity and financial responsibility, unique in its field, but with respect to the sale of its money orders in Illinois found it had no license to transact business, was not subject to any form of state regulation, does not always require bonds of its agents as appellees do, and may even be able successfully to avoid service of process by the courts of Illinois.

The great size and power of American Express Company, amply brought out at the trial of this case, and at the trial in the Western District of Wisconsin, did not impress either court as affording a rational basis for the distinction.

The Illinois legislature could have made size an index for the classification and then only those who fall within the class would qualify for the exemption. *Engle v. O'Malley*, 219 U.S. 128. In the challenged statute the name on the instrument sold, not size, is index for the so-called classification.

If the old American Express Company chartered by special act of the Illinois legislature had not lost its charter in 1902, and if that charter had provided that no seller of American Express Company money orders would ever have to be licensed, the exemption might be justified *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U.S. 79.

In *Erb v. Morasch*, 177 U.S. 584, a particular railroad was excepted from an ordinance limiting the speed of trains to six miles per hour. This Court said

> "It is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations."

In *Toyota* v. *Hawaii*, 226 U.S. 184, the challenged statute imposed a license tax of $100 on auctioneers in Hawaii and one of only $15.00 on auctioneers in other districts. There also the geographical distinction justified the different regulations. It is suggested that if that statute exempted auctioneers having a contract with the Dole Pineapple Company there would have been a different result.

Williams v. *Baltimore*, 289 U.S. 36, cited in appellants' brief, page 20, and their jurisdictional statement, page 11, as "squarely in point" did not involve the constitutional provision here invoked. *Mayor, etc.* v. *The Ministers & Trustees of the Starr Methodist Church*, 106 Md. 281, discussed in *Williams* v. *Baltimore* is helpful here. The Maryland court said:

> "In the case we are considering no classification has been made at all so that the law lacks the very first element which it must have to satisfy the Fourteenth Amendment of the Constitution. It is simply an arbitrary selection of the property of the appellee and the conferring of a benefit upon it which is denied all other owners of similar property. If this can be done in one case it can be done in another and it would then be the power of the legislature to wilfully discriminate between its citizens, taxing some on account of their property and at the same time exempting others similarly situated and all the while acting under no reasonably proper rule whatever, but solely at the dictation of its own caprice. Even an unreasonable classification of property is prohibited by the Fourteenth Amendment. All the more must a perfectly unreasonable discrimination between properties in the same class be prohibited by the same amendment."

None of the findings of the District Court is challenged by appellants save one, that American Express Company may not be subject to service of process by the courts in

Illinois. Their challenge is based on a change in the Illinois Civil Practice Act made subsequent to the trial, but neither before nor after the adoption of the present Illinois Civil Practice Act is an unincorporated association subject to an action at law in Illinois and while now a partnership may be sued, there is not only no showing that American Express Company is a partnership, but the record shows it is not.

No doubt appellees had the burden of proving that the statute created an arbitrary and unreasonable classification. The District Court recognized that burden of proof

The exemption having been properly attacked must disclose its rational basis of discrimination. It is not to be supported by mere fanciful conjecture and cannot stand as reasonable if it offends the plain standards of common sense. Appellants invoke the presumption which attaches to any legislative action, but that is a presumption of fact of the existence of conditions supporting the legislation As such it is a rebuttable presumption. It is not a conclusive presumption or a rule of law which makes legislative action invulnerable to constitutional assault. *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U.S. 194.

Appellants have directed the Court's attention to statutes of four other states which appellants say involve legislation of varying degrees of similarity. In no other statute, except the Wisconsin statute, is there a bald exemption of persons selling American Express Company money orders and the exemption in the Wisconsin act was held unreasonable and unconstitutional in *Currency Services, Inc.* v. *Matthews*, 90 Fed. Supp. 40.

The other statutes cited by appellants at p. 6 do not exempt American Express Company by name. Neither the

New York nor New Jersey statutes cited involve the regulation of the sale of money orders. Both of those statutes merely involve the regulation of check cashing and neither of those statutes makes an exemption of any kind. The California statute exempts from its operation all those licensed under and complying with another article of the California code.

II.

THE STATUTE IS NOT LACKING IN CLARITY AS TO ITS APPLICATION TO APPELLEES OR THE MEANING OF THE CHALLENGED EXEMPTION AND ITS DISCRIMINATORY EFFECT UPON APPELLEES IS CLEAR. AS THE CHALLENGED EXEMPTION IS IN THE DEFINITION OF COMMUNITY CURRENCY EXCHANGE IT AFFECTS THE WHOLE STATUTE AND IS NOT SEVERABLE.

The court below in saying that appellees are engaged in the business of selling money orders but not in the ordinary business of a currency exchange makes no novel observation in light of common experience, but there is no question that appellees' agent Derrick is engaged in the community currency exchange business as defined in the challenged statute. In stating that the Illinois Supreme Court in *McDougall* v. *Lawler*, 389 Ill. 141, did not have occasion to consider the full extent of the statute's discriminatory effect, the District Court was attempting an explanation of why that court sustained the discrimination. It is not a reason to remit appellees to the state courts that such courts must be given an opportunity to point out the obvious discriminatory effect upon persons in appellees' class.

The Supreme Court of Illinois has held the Act and the exemption valid and further said that "The General As-

sonably would surely never have passed the Act if they had thought the sand companies would be made subject to its rules and regulations." The state court thus found that the exemption provisions were not severable, which also distinguishes this case from *Federation of Labor v. McAdory*, 325 U.S. 450, and *CIO v. McAdory*, 325 U.S. 472. In *Staubach v. Worley*, 339 U.S. 328, the plaintiffs were not seeking to prevent continuing loss from being unable to carry on a lawful business, but without showing any danger of loss attacked the Hawaiian statute which carried no criminal penalties for infractions, which was not clear as to its application to certain schools and teachers and which had not been construed by the Hawaiian courts. The Supreme Court of Illinois has held that the challenged act would not have been passed without the exemption and it must follow that the exemption is not severable even though the Illinois Supreme Court has not decided whether the severability clause of the statute would be so applied as to remove the alleged discrimination. Here if the severability clause were applicable the meaning of the words "community currency exchange" as used in the Act some sixty odd times would be changed and the scope of the Act would be enlarged to include some 1300 odd sellers of American Express Company money orders in Illinois. (R. 34-36)

While a decision of the state court as to severability of a provision is conclusive upon this Court, if there is no controlling state court decision in cases coming from the lower federal courts such questions of severability must be determined by the Supreme Court. *Dorchy v. Kansas*, 264 U.S. 286, 290, 291; *Corrigan v. United States*, 238 U.S. 347, 366; *Mayo v. Anderson*, 238 U.S. 368, 386. Thus by reason of the decision in *McDougall v. Lauder*, 389 Ill. 141, 151, holding that the exemption is not severable and the relationship the exemption has to the definition, which

in turn is related to the whole, there is no doubt that the exemption is not severable, and there is no question that this Court can determine the issue of severability.

III

THE DISTRICT COURT FOUND THAT APPELLEES WERE NOT GUILTY OF ANY CONDUCT OF SUCH A NATURE AS TO BAR THEM FROM EQUITABLE RELIEF OR ANY CONDUCT HAVING ANY RELATION TO THE CHALLENGED STATUTE CALLING FOR THE APPLICATION OF THE CLEAN HANDS MAXIM.

The District Court by reference to *Toomer* v. *Witsell*, 334 U.S. 385, gave appellants a short answer to their insistence that appellees' conduct is of such a nature as to bar them from equitable relief. In that case this Court said:

> "The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree."

In addition the District Court found as a fact that appellees' use of the words "licensed" and "bonded" on their money orders was not intended to deceive the public, and in fact did not deceive, but was intended to refer to a license from Checks, Incorporated to handle Bonded money orders.

Appellants now ignore both the short answer and the finding of fact.

They appear to contend that the District Court should have found and that this Court should find, or direct the District Court to leave the question to the state court for determination, that plaintiffs came into court without clean hands. The appellants omit the facts at page 26 of their

brief that on each money order it was plainly indicated that the Bondified money transfer trademark was registered in the United States Patent Office by Checks, Incorporated, of Minneapolis, Minnesota, that the appellees were licensed, and bonded and that the account maintained at the City National Bank and Trust Company of Chicago pursuant to a deposit agreement was bonded.

The word "license" means simply permission or authority and does not mean necessarily government or state authority. *Sinnot* v. *Davenport*, 63 U.S. (22 Howard) 227, 240; *Elliott Co.* v. *Lagonda Mfg. Co.*, 205 Fed. 152, 157; *Western Electric Co.* v. *Pacent Reproducer Corp.*, C.C.A. 2, 42 Fed. 2d 116, 118; *Hartford Ins. Co.* v. *Peoria*, 156 Ill. 429, 427. The record shows that Bondified money orders bearing precisely the same legend have been and are being sold in Michigan where no state license is required to sell money orders.

The argument that the indiscriminate use of the word "Bondified" is a continuing misrepresentation of the ownership of the business and the financial responsibility thereof completely ignores the fact that "Bondified" is a service mark as distinguished from a trademark, and even a trademark may be licensed so long as the agreement is not merely a "naked" license agreement. *E. I. duPont de Nemours Co.* v. *Celanese Corp. of America*, 167 Fed. 2d 848. A trademark license is valid if it provides for supervisory control of the product or service. *Arthur Murray, Inc.* v. *Horst*, 110 Fed. Supp. 678.

This is the second time appellants seek in this court to condemn the appellees as irresponsible persons engaged in "an objectionable enterprise" (Appellants' brief, p. 22), coming into a court of equity without clean hands. Use of the words "injected" (appellants' brief p. 11), "diverted" (appellants' brief p. 12), "siphoned" (appellants'

brief p. 10) is made in a patent and calculated attempt to make this Court believe that appellees should be barred from equitable relief. Ignoring the actual operations of the appellees and their agreements with one another and their corporation they state at page 13 of their brief "Thus the corporation has only a few dollars. The partnership owes the corporation at least $45,000 and has about $27,000 in their operating and special accounts against which there is an undisclosed amount of outstanding unpaid money orders". We have stated the facts at length in order to set the record straight on this appeal. Much is made of the $38.10 remaining in the corporate bank account which has a balance only because one of the appellees borrowed money from their corporation and paid it back with $38.10 interest. There is nothing in the record to support the statement that the partnership is indebted to the corporation. The partnership is performing valuable services for the corporation and the members of the partnership have lent their personal credit to the success of what would have been a corporate venture but for the unusual "policy" of clearance by arrangement between the State Auditor, Orville E. Hodge, and the Secretary of State.

IV.

THE FINDING OF THE DISTRICT COURT THAT THE APPELLEES HAVE DEMONSTRATED THE IMMINENCE OF IRREPARABLE INJURY IS SUPPORTED BY THE RECORD.

Appellants now challenge the sufficiency of evidence of irreparable injury to appellees. Again the findings of fact are ignored. (Finding of fact No. 10, R. 526)

The fact that prosecuting officers of the state have threatened to enforce against the appellees an unconstitutional state law relating to their business, and if not enjoined will prosecute the appellees unless they comply with such law

shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction since withdrawal from further business until a test case is taken through the state courts, and perhaps to this Court, would result in substantial loss of business for which no compensation could be obtained: *Toomer* v. *Witsell*, 334 U.S. 385, 392; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452; *Hygrade Provision Co.* v. *Sherman, et al.*, 266 U.S. 497, 500; *Ex-mination* v. *Palmer*, 235 U.S. 100; *Gibbs* v. *Buck*, 307 U.S. 66, 77, 78.

CONCLUSION

The inclusion in the definition of the term "community currency exchange" of one who is "engaged in the business of selling or issuing money orders", coupled with the exemption by name of a concern engaged in that very business, renders the statute discriminatory and unconstitutional.

For the reasons stated it is respectfully submitted that the judgment should be affirmed.

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